

**Pekowski Enterprises, Inc. d/b/a the Expo Group and
International Brotherhood of Teamsters, Local
Union 745, AFL-CIO. Case 16-CA-18257**

January 21, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On September 5, 1997, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a limited exception and a supporting brief, and the General Counsel, the Charging Party, and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.

The judge's recommended Order includes affirmative remedies requiring the Respondent to restore the terms and conditions of employment in effect prior to the Respondent's withdrawal of recognition from the Union, make whole employees who would have been referred by the Union and employed by the Respondent if the Respondent had continued to use the exclusive hiring hall procedure as required by the contract, and recognize and bargain with the Union as the exclusive representative of unit employees. The General Counsel excepts to the judge's failure to further order the Respondent to make whole unit employees who were hired outside the exclusive hiring hall procedure and not provided the wages and benefits prescribed by the parties' agreement. We find merit in the General Counsel's exception, because the Order recommended by the judge does not fully remedy the Respondent's failure to apply the terms and conditions of the collective-bargaining agreement to employees working in the bargaining unit. See *Williams Pipeline Co.*, 315 NLRB 630, 632-633 (1994); and *Oklahoma Installation Co.*, 325 NLRB 741 (May 14, 1998). We modify the Order accordingly.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified, and orders that the Respondent, Pekowski Enterprises, Inc., d/b/a the Expo Group, Irving, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

¹ We note that the text quoted in sec. IV.3.A, par. 11 of the judge's decision appeared in the brief of the General Counsel rather than that of the Respondent, and therefore, contrary to the judge, it does not demonstrate a concession by the Respondent.

² We also modify par. 1(b) of the Order to conform to the Board's customary remedy for the violation found.

1. Substitute the following for paragraph 1(b) of the Order.

"(b) Failing to bargain with the Union as the exclusive representative of bargaining unit employees by unilaterally ceasing the application of the terms and conditions set out in the 1993-1996 collective-bargaining agreement to unit employees and by unilaterally ceasing its utilization of the union hiring hall referral services as required in the collective-bargaining agreement."

2. Substitute the following for paragraph 2(a) of the Order.

"(a) Restore the terms and conditions of employment which were in effect, and applicable to employees in the bargaining unit, including the use of the Charging Party's employment referral service in the manner agreed on in the parties' 1993-1996 collective-bargaining agreement, before the Respondent unilaterally changed those terms and conditions of employment on August 1, 1996, and make whole all unit employees for losses suffered as a result of the changes, as calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with the Union, International Brotherhood of Teamsters, Local Union 745, AFL-CIO, as the exclusive representative of our employees in the following unit:

Included: drivers, checkers, helpers, warehousemen, dockmen, forklift operators, mechanic Class A, mechanic Class B, servicemen, partsmen, tiremen, within the jurisdiction of Teamsters Local 745.

Excluded: all other employees, including forklift operators working on premises for which a

building permit has been issued, guards, and supervisors as defined in the Act.

WE WILL NOT fail to bargain with the Union as the exclusive representative of bargaining unit employees by unilaterally ceasing the application of the terms and conditions set out in the 1993–1996 collective-bargaining agreement to unit employees and by unilaterally ceasing our utilization of the union hiring hall referral services as required in the collective-bargaining agreement.

WE WILL NOT in any like or related manner refuse to bargain collectively with the Union as the exclusive representative of the employees in the unit, or interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind all changes we made, on and after August 1, 1996, in the terms and conditions of employment of bargaining unit employees, and restore the terms and conditions of employment as described in our 1993–1996 collective-bargaining agreement with the Union, and WE WILL make whole, with interest, all unit employees for losses suffered as a result of the changes.

WE WILL make whole, with interest, all employees who would have been referred to us for employment, through the Union's referral service, and employed by us, but were not employed by us because, on and after August 1, 1996, we did not use the Union's referral service as provided in our 1993–1996 collective-bargaining agreement with the Union.

PEKOWSKI ENTERPRISES, INC. D/B/A THE EXPO GROUP

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. In this case, the General Counsel of the National Labor Relations Board (the General Counsel or the Government) alleges that Pekowski Enterprises, Inc. d/b/a the Expo Group (the Respondent or the Company) unlawfully withdrew recognition from International Brotherhood of Teamsters, Local Union 745, AFL–CIO (the Charging Party or the Union) and refused to bargain with it, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). It also alleges that the Respondent unilaterally changed terms and conditions of employment without notifying the Union and giving it the opportunity to bargain about those changes and their effects.

This case turns on whether the Respondent is an employer engaged in the construction industry and whether it had recognized the Union pursuant to Section 8(f) of the Act, rather than Section 9(a). I find that the Respondent is not an employer in the construction industry, and therefore could not grant recognition under Section 8(f). Therefore, its withdrawal of recognition and refusal to bargain violated the Act as alleged.

Procedural History

Based on an original charge the Union filed and served on September 25, 1996, and an amended charge it filed and served on November 8, 1996, the Regional Director for Region 16 of

the National Labor Relations Board (the Board) issued a complaint in this case on November 14, 1996, which the General Counsel amended at hearing in the manner discussed below. The parties appeared before me at a hearing on February 24–25, 1997, in Fort Worth, Texas. They also filed posthearing briefs, which I have considered.¹

FINDINGS OF FACT

I. STATUS OF THE PARTIES

The Respondent admits that the Union filed and served the charge and amended charge as alleged in the complaint. It also admits it is a Texas corporation with a place of business in Irving, Texas, that it has been engaged in setting up and fabricating exhibits for the trade show and convention industry, and that during the 12 months immediately preceding the filing of the charge, it provided services valued in excess of \$50,000 directly to customers outside the State of Texas. I so find.

It also admits, and I find, that at all material times it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, that John Pekowski has been its president, a supervisor within the meaning of Section 2(11) of the Act, and its agent within the meaning of Section 2(13) of the Act.

Similarly, the Respondent admits, and I find, that at all times material to this case, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

II. CONTESTED COMPLAINT ALLEGATIONS

1. Appropriateness of unit

At hearing, the General Counsel orally amended paragraph 7 of the complaint, without objection, to allege that the following employees of the Respondent constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: drivers, checkers, helpers, warehousemen, dockmen, forklift operators, mechanic Class A, mechanic Class B, servicemen, partsmen, firemen, within the jurisdiction of Teamsters Local 745.

Excluded: all other employees, including forklift operators working on premises for which a building permit has been issued, guards and supervisors, as defined in the Act.

(Tr. 28; see also Tr. 26–27.)

The Respondent had denied the original paragraph 7 of the complaint, and it denied the allegations in this amendment.

2. Recognition of union

As stated above, the General Counsel and the Respondent disagree about whether the Respondent granted recognition to the Union under Section 9 of the Act, or under Section 8(f) of the Act. However, the parties do not dispute most of the relevant facts. Instead, they disagree with the conclusions to be drawn from those facts.

For example, paragraph 8 of the complaint alleges that the Company recognized the Union as the exclusive bargaining representative of the unit employees in about May 1992, and that such recognition has been embodied in successive collective-bargaining agreements, and that the most recent of these agreements had been effective from August 1, 1993, to July 31, 1996. The Respondent does not dispute entering into these

¹ Certain errors in the transcript (App. A) have been noted and corrected. (App. A omitted from publication.)

agreements, but denies that they resulted in a bargaining obligation.

3. Alleged refusals to bargain

Complaint paragraphs 10 and 11 allege that the Union sent letters to the Company on April 30 and September 26, 1996, requesting to negotiate. The Respondent does not deny the letters, but does deny that they were “good faith offers to bargain.”

Complaint paragraph 12 alleges that by the September 26, 1996 letter, the Respondent notified the Union that it had no obligation to bargain, that it withdrew recognition from the Union, and since then has failed and refused to recognize the Union as the exclusive bargaining representative of employees in the unit. The Respondent has denied these allegations, but has stipulated to the authenticity of the September 26, 1996 letter, which was received into evidence as General Counsel’s (G.C.) Exhibit 9.

Complaint paragraph 13 alleges that since about August 1996, the Respondent has ceased applying the 1993–1996 collective-bargaining agreement to the employees in the bargaining unit, and also ceased using the Union’s hiring hall referral services as required by that agreement. The Respondent denied these allegations, but it did not submit any proof to show that it has continued to ask the Union to refer individuals for employment.

4. Affirmative defenses

In its answer, the Respondent raised a number of affirmative defenses challenging an essential element of the General Counsel’s theory, specifically, that at time the Respondent entered into a collective-bargaining relationship with the Union, a majority of the bargaining unit employees had chosen or designated the Union as their representative.

The first of these defenses contends that the 1993–1996 collective-bargaining agreement—was a “prehire agreement executed between a construction industry contractor” and the Union and therefore, under *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Union enjoyed no presumption of majority status after the agreement expired.

As a second defense the Company argues that even if it isn’t in the construction industry, its 1993–1996 agreement with the Union was still a prehire agreement, and the same principle should apply to a prehire agreement outside the construction industry as inside it. Namely, such an agreement, by its nature, cannot give rise to a presumption of majority status after the contract expires.

The Respondent’s third defense states that the “Union, by its actions, has failed and refused to bargain collectively with Respondent.”

Its fourth defense contends that the Union “has never alleged or established its majority status in regard to the unit named in the Complaint.”

The fifth defense alleges that the Respondent “has a reasonable basis for believing that the Union does not have a majority status” in any unit of the Company’s employees.

The Respondent’s sixth defense states that at all relevant times, another labor organization has been the exclusive bargaining representative of “certain of the positions named in the unit” described in the complaint.²

² Additionally, in its posthearing brief, the Respondent also challenges the appropriateness of the unit described in par. 7 of the com-

III. FACTS RELATING TO THE ALLEGED UNFAIR LABOR PRACTICES

1. The Respondent’s relationship with the Union

Paragraph 8 of the complaint alleges, in part, that the Respondent recognized the Union as the designated collective-bargaining representative of its employees in “about May 1992.” At trial, the Respondent’s owner, Raymond J. Pekowski,³ testified that he owned a company called Tesco, which was a predecessor to the Respondent.⁴ The record does not establish when “Tesco” became “The Expo Group.” Since no party has raised an issue regarding successorship, I will refer to them both as “Respondent.”

The Respondent builds many exhibits in its own shops, which are located in a warehouse where the Respondent also receives and stores displays from various exhibitors. To take such materials to and from a convention site, the Company had relied on employees of a contractor, M & M Enterprises. The Union represented these M & M Enterprises employees.

Owner Pekowski testified that in 1992, a union official told a company representative, Jim Miller, that the Union “wasn’t going to provide labor” to M & M Enterprises any more, and that the Company “had to sign this contract.” (Tr. 264.)⁵

Because of a major show at that time, the Company needed help to take materials to and from the exhibition hall, so Miller signed a collective-bargaining agreement entitled “TEXAS CONFERENCE OF TEAMSTERS MASTER TRANSFER-CARTAGE-GARAGE AGREEMENT FOR THE STATE OF TEXAS,” which was effective from August 1, 1990, through July 31, 1993. (R. Exh. 9E.)

Representatives of the Charging Party and two other Teamsters union locals, as well as a representative of the Texas Conference of Teamsters, signed this agreement. Although the title of this contract suggests that the Texas Conference of Teamsters was a party, the recognition clause indicates that a local union, rather than the Texas 5 Conference, was the collective-bargaining representative in a particular area. Specifically, the recognition clause states, in part, as follows:

Section 1. The Employer recognizes and acknowledges that the Local Unions affiliated with the Texas Conference of Teamsters are the exclusive representatives of all employees in the classifications of work covered by this

plaint, as amended at hearing. I do not consider this an affirmative defense because the burden of proving that the alleged bargaining unit is appropriate rests on the General Counsel.

³ In accordance with the *United States Government Style Manual*, courtesy titles such as “Mr.” and “Ms.” ordinarily will not be used in this decision. No disrespect is intended. For clarity, a title occasionally may be used where that title indicates the person’s authority or job function.

⁴ When asked if Tesco was “a predecessor company to The Expo Group,” Pekowski testified, “Yes, it was.” (Tr. 162.) It should be noted that the complaint has not raised an allegation of successorship, and the Respondent has not raised any defense involving denial of successorship.

⁵ Pekowski’s testimony on this point is hearsay because he was not present when Union Representative Rogers reportedly made the statement to Miller. Neither Rogers nor Miller testified. The statement attributed to Miller is uncontroverted by them.

I will consider this hearsay only as background. As discussed below, I need not decide whether or not the Union coerced the Respondent into a bargaining relationship because the conclusive presumption of lawful recognition makes that issue immaterial.

Agreement, and Supplements thereto for the purpose of collective bargaining as provided by the National Labor Relations Act.

Section 2. The Local Union is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, but the International is not a party to this Agreement.

Section 3. This Agreement will include and cover all of the following work and classifications of the Employer: truck drivers, truck driver helpers, warehousemen, checkers, mechanics, shop employees.

In keeping with existing practices and NLRB Case No. 16-CD-129 and Case No. 23-CD-389, this Agreement shall also include and cover forklift work and operators except forklift work done on premises for which a building permit has been issued

Section 4. The Company agrees that if it opens an operation in any city in the State of Texas that they will give recognition to the Local Union whose jurisdiction the operation is in. Recognition in this Contract shall apply.

(R. Exh. 8.)

Pekowski himself signed the succeeding collective-bargaining agreement, which covered the period August 1, 1993, through July 31, 1996. Its recognition clause includes language identical to that in the 1990-1993 agreement quoted above. (G.C. Exh. 2.) Although the contract in evidence does not reflect the name of the company on behalf of which Pekowski signed, the record as a whole indicates that it was the Expo Group.

Owner Pekowski testified that he was "coerced" into entering into the 1990-1993 agreement. However, he did not make that claim with respect to the 1993-1996 contract.⁶ He admitted that no one picketed, threatened him, or vandalized the Company. (Tr. 163.) The evidence does not establish that the Respondent recognized the Union in 1992 because of unlawful coercion.

Similarly, the record does not establish that the Union coerced the Company into signing the 1993-1996 agreement. I find that the Respondent did not sign that agreement because of any unlawful pressure.

2. Use of the hiring hall

The Union operates a hiring hall and the 1990-1993 and 1993-1996 collective-bargaining agreements required signatories to use it. The clause appears in article 5, section 3, and states in part as follows:

Section 3. The Employer shall notify the Union whenever additional employees are needed and the Union shall have the first opportunity to furnish applicants, if it is able to do so. The Employer shall give preference to any applicant referred to it by the Union. In the event the Union is unable to furnish applicants when requested to do so, the Employer may hire employees from any source.

⁶ With respect to the 1993-1996 agreement, Pekowski testified, in part, as follows:

Q. And you're not saying you were coerced when you put your signature there?

A. No. What I'm saying is that just even by looking at that, the union didn't even know the name of our company. We weren't party to the negotiations. They just sent this to me and said, here, sign it. And we needed labor and we signed it. (Tr. 162-163.)

(G.C. Exh. 2 at p. 6.)

This same section allowed the Union to file a grievance if the employer rejected an applicant the Union had referred. Former employee Donna French testified that she worked for the Respondent from about 1988 to May 1996 (Tr. 30) as a casual employee referred by the Union. The Respondent never contacted her directly but went through the Union's hiring hall when it needed workers. (Tr. 34.)

Another employer, Marty Carrington, gave similar testimony, except that his last work with the Company, which he obtained through the Union, extended from mid-September 1995 until the end of July 1996, when the collective-bargaining agreement expired. (Tr. 62-63.) Carrington testified that when he went to work on July 31, 1996, his supervisor said they didn't need him any more. (Tr. 69-70.)

3. Work of the unit employees

French testified that her duties as a freight handler and freight checker included writing reports based on information from bills of lading. She would check the freight as it was loaded on or off the truck at the convention site. She performed these services wherever the Company had a show, which was usually at the Dallas Convention Center. (Tr. 31-32.)

Carrington described his duties as a warehouseman as follows: "I received freight, marked it, wrote it up on receiving reports, staged it or loaded it on a trailer, whatever was necessary. If I staged it, when it became time for it to go to show site, I loaded it on trailers, and then lots of times I would deliver it to show site." (Tr. 63-64.)⁷

In understanding the scope of work performed by bargaining unit employees, it is also helpful to describe what they don't do. The record is clear that the employees referred by the Union did not design, build, put together, or take apart the exhibits which they took to and from the show sites. Employees classified as carpenters and decorators, not in the bargaining unit, did the building, based on designs by other nonunit employees. They also did the assembling and disassembling of the exhibits. (Tr. 70, 260, 369.)⁸

Unit employees also were not involved in laying carpet at show sites. (Tr. 250.) That work also is done by decorators. (Tr. 253.)

Pekowski testified that the Respondent's employees, classified as decorators, "performed the supplying of both equipment, carpeting, cleaning, on-site labor, suspended sign hanging, standard furniture." (Tr. 373-374.)⁹ Other parts of the record suggest that another labor organization represents at least some of the decorators in a unit apart from the unit at issue here.

⁷ Owner Pekowski testified on cross-examination that employees classified as "decorators" drove the freight from the company warehouse to the show site, but that the Union contested this work assignment. He also testified that decorators unloaded and installed the exhibits. (Tr. 370.) Decorators are not in the unit alleged in the complaint, as amended.

⁸ Pekowski testified that decorators were represented by another labor organization. (Tr. 260.)

⁹ This testimony suggests a clear demarcation between the customary work of the decorators and the work of employees in the bargaining unit alleged in the complaint, as amended. Thus, it appears relevant to both the issue regarding the appropriate unit, and the issue as to whether the employees represented by the Union were engaged in the building and construction industry.

Additionally, the record indicates that sometimes, work assignment disputes arose between the labor organization representing the decorators and Teamsters Local 745, over which employees got to “truck” the freight from the Respondent’s warehouse to the show site. Pekowski’s testimony does not establish which group of employees got to do this trucking work before the collective-bargaining agreement expired on July 31, 1996, although he did state that “Usually Decorators claim that work.” (Tr. 169.)¹⁰ The record does not contain specific information about any such dispute.

From the evidence as a whole, I conclude that with the exception of the trucking work claimed by the union representing the decorators, there was a pretty clear demarcation between the work of employees referred by the Teamsters and the work of 30 other employees. The employees referred by the Teamsters were involved in moving things.

Some of them, like French, kept records of things being moved. Others, like Carrington, also lent their strength and skill to getting that freight from one location to another. However, all of them performed some part of the process of transporting freight.

On the other hand, these employees did not design exhibits, work performed by others classified as “designers.” Similarly, the employees referred by the Teamsters did not build the exhibits in the Respondent’s shops. They did not take these exhibits apart for shipment to or from the show site, and they did not put the exhibits together at the show site. That work fell to the decorators.

In a nutshell, the decorators build, unbuild, and rebuild exhibits. The employees referred by the Teamsters carried the freight or kept track of where it went, but did not get involved in the mechanics of putting it together or taking it apart.

4. The employee complement

In 1996, a total of 137 different persons worked for the Company on referral by the Union. Of these, the employee who worked least for the Respondent, Johnny G. Johnson, worked 4 hours in 1996, and the employee who worked most, Marty N. Carrington, worked 1263.75 hours.

As would be expected, these 137 included a number who had worked for the Respondent before 1996, as well as some who had not. None of the 137 employees received a check after August 9, 1996, which, I conclude, is consistent with evidence indicating that the Respondent did not seek referrals from the Union after the contract expired on July 31, 1996. The typical delay between the end of the pay period and issuance of the paycheck would account for the checks being dated August 9 rather than July 31, 1996.

The documents in evidence do not show how many hours an employee worked in a given month or a given quarter, but only report the total straight time and overtime hours the employee worked in 1996. Therefore, it is not possible to determine how

many hours any particular employee worked in the 90-day period preceding the withdrawal of recognition.

Similarly, it is not possible to determine from the record how many of these employees were working for the Respondent at any given time. Testimony suggests that the need for such employees fluctuated greatly, depending on whether a trade show was underway or about to get underway. However, the documentation does not establish, for example, whether the employee complement in this unit ever dropped to one or none, and if so, how long it stayed at that level before increasing.

5. Withdrawal of recognition

The collective-bargaining agreement included a provision that it would renew automatically unless a party to it gave notice to terminate or modify it. To forestall the automatic renewal, that notice had to be given at least 60 days before expiration. (G.C. Exh. 2, p. 38.)

The Union gave such notice in an April 30, 1996 letter to Pekowski. This letter was signed by Charles Rogers, who was then president of Local 745 and its business representative. (G.C. Exh. 3.)

On May 29, 1996, Owner Pekowski sent Union President Rogers two letters. The first notified the Union that it desired “to withdraw from the current multi-employer bargaining group and to enter into negotiations with the Teamsters union on its own behalf.”¹¹ (G.C. Exh. 5.) The second repeated the Respondent’s announcement that it was withdrawing from the multi-employer association, and also gave notice “to terminate and/or modify” the collective-bargaining agreement. (G.C. Exh. 6.)

The Respondent sent a similar letter, including both its notice of withdrawal from multiemployer bargaining and its notice to terminate or modify the collective-bargaining agreement, to the Texas Conference of Teamsters. Owner Pekowski also signed this letter, dated May 30, 1996. (G.C. Exh. 7)

In August 1996, the International Brotherhood of Teamsters placed Local 745 in receivership, and removed Rogers from his positions as president and business representative. The trustee appointed to take charge of Local 745 then named David Doyle to be a business agent. (Tr. 77–78.)

Doyle testified that on September 24, 1996, the Union picketed a trade show site at which the Respondent was present. The next day, the Union picketed again, and Doyle had a conversation at the picket line with one of the Company’s attorneys. That same day, Doyle filed an unfair labor practice charge against the Respondent. (Tr. 85 and 86.)

On September 26, 1996, Doyle sent a letter to Pekowski introducing himself as business agent and requesting bargaining. (G.C. Exh. 8.) This letter, sent by facsimile as well as certified mail, drew a response from the Company that same day. In his reply, also sent by facsimile and certified mail, Pekowski stated, in part, as follows:

In regard to your indication of willingness to negotiate . . . be advised that on or about May 30, 1996, The Expo Group gave timely notice to local 745 that The Expo Group was withdrawing its affiliation with the multi-employer group signatory to the then-existing collective bargaining agreement. Accordingly, The Expo

¹⁰The record suggests the Respondent encountered a similar problem when working on an exhibition in Houston, which fell within the geographical jurisdiction of another Teamsters local which signed the “Master Transfer-Cartage-Garage” Agreement described above. Based on the testimony, I find that when confronted with a work assignment dispute, at least one arising outside the area covered by Teamsters Local 745, the Company would respond to a grievance by paying the employees not assigned to the work as well as the employees who performed the work.

¹¹The General Counsel has not contended that the Respondent’s withdrawal from the multiemployer association was untimely.

Group will no longer negotiate with the Teamsters as a member of that multi-employer group.

In regard to your allegation that The Expo Group is committing an ongoing unfair labor practice by its failure to negotiate with the Teamsters, be further advised that The Expo Group has no obligation to bargain with the Teamsters Local 745.

(G.C. Exh. 9.)

On September 27, 1996, Doyle replied, and repeated the demand that the Respondent bargain. (G.C. Exh. 10.) The record establishes that the Respondent has not recognized or bargained with the Union denying that it had a duty to bargain on September 26, 1996.

IV. THE LEGAL PRINCIPLES

The complaint alleges two separate violations of Section 8(a)(5) and, derivatively, Section 8(a)(1) of the Act. The essence of the first violation is that the Respondent had a duty to negotiate with the Union regarding modifications in the collective-bargaining agreement, but refused the Union's request to do so. In other words, it alleges a "refusal to bargain" in its most literal sense.

The duty to bargain includes this duty to negotiate¹² but does not stop there. It also requires an employer to give the union notice and an opportunity to bargain before making certain changes in wages, hours, or other terms and conditions of employment. The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) by making such changes without notifying the Union and affording it that opportunity.

To establish the first alleged violation, the General Counsel must prove the following elements: (1) There is a unit of employees which is appropriate for collective bargaining. (2) A majority of the employees in that unit has chosen the Union to represent them. (3) The Union has requested to bargain. (4) The Respondent has refused.

Establishing the second alleged violation also requires the General Counsel to prove the first two of these elements. Additionally, it requires proof that the Respondent made changes in terms and conditions of employment which are mandatory subjects of bargaining, without first giving the Union notice and an opportunity to negotiate regarding the changes and their effects.

1. The appropriate unit

A. The Respondent's Arguments

As noted above, the General Counsel must plead and prove that the Union represents employees in a unit appropriate for collective bargaining. At hearing, the General Counsel amended the unit description in the complaint and the amended unit description is quoted verbatim above. The Respondent denies that the unit described in the complaint, as amended at hearing, is appropriate, arguing in its posthearing brief as follows:

¹²Sec. 8(d) of the Act defines the duty to bargain, in part, as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

There can be no duty to bargain in the new unit asserted by General Counsel in the amendment to the Complaint. The new unit is not restricted to the casual employees who, alone, were referred under the contracts by Local 745 and Local 988. It includes categories never employed from the hiring hall by Expo and, arguably, would include full-time employees at Expo's warehouse—never a part of the bargaining relationship. General Counsel, by altering the unit, necessarily abandons enforcement of the old relationship. Yet the Union's original notice, its demands for a contract, and its requests to bargain, were all based upon a renewal of the old contractual relationship.¹³

(R. Br. at p. 7.)

Later in its brief, the Respondent elaborated on its argument that the unit alleged as amended by the General Counsel at hearing, differed from the unit described in the collective-bargaining agreement:

The amendment to the Complaint to change the unit in which General Counsel asserts a duty to bargain is bewildering at best. It includes five classifications which had not been employed under either of the agreements. The list of employees working since 1993 contains no wage rate equal to that for Mechanic Class B, Serviceman, Partsman, or Tireman. G.C. Exh. 11. Donna French had seen no such employees during her eight years of employment. General Counsel used classifications from the first part of Appendix A of the 1993 Agreement (Tr. 26) despite the fact testimony was unanimous that these classifications did not apply to Expo insofar as full-time employees were concerned. Tr. 120, Tr. 34.

Not only does the alleged unit differ from that in the contract, the contracting parties are different from that for which General Counsel seeks bargaining from Respondent. The contract covers employees throughout the State of Texas, apparently all members in the Texas Conference of Teamsters. Expo properly notified Local Union 745 of termination, but it also gave notice to the Texas Conference of Teamsters with notice to the other unions who had signed the agreements. G.C. Exhs. 5, 6, and 7. Expo's offer to bargain was with "Teamsters." It was not separated by individual organizations and it was served upon all. General Counsel's intent to enforce an obligation to bargain solely for one of the four bargaining agents attempts a unilateral modification of the bargaining relationship.

At no time did Local 745 or any other Teamster affiliate request bargaining in a unit as circumscribed by the Complaint amendment. Whether or not it be an appropriate unit, there was never a request to bargain in a unit consisting of new classifications involving a geographical re-

¹³By "the old contractual relationship," the Respondent appears to be referring to its argument that it recognized the Union, and signed the collective-bargaining agreements, pursuant to Sec. 8(f) of the Act, which grants an exception to the principle that an employer unlawfully assists a union if it recognizes the union as the collective-bargaining representative of a unit of employees before the company hires the employees the union is supposed to represent. The Act makes such premature recognition unlawful because it deprives the employees of their statutory right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to refrain from such activities. See 29 U.S.C. § 157. The construction industry exception created by Sec. 8(f), 29 U.S.C. § 158(f), will be discussed below.

striction coextensive with the jurisdiction of Local 745. As pointed out previously, there has been no showing of majority support in any unit. The ambiguous unit newly created by General Counsel is impossible of measurement. No one knows who is in it.

(R. Br. at 27–28.)

To consider the Respondent's arguments fully requires a close comparison of the bargaining unit alleged in the complaint with the terms of the collective-bargaining agreement.

B. Composition of the Unit

Paragraph 7 of the original complaint, before amendment at hearing, alleged an appropriate unit which included "all truck drivers, truck driver helpers, warehousemen, checkers, mechanics, shop employees and forklift operators employed within the state of Texas" and excluded "all other employees including forklift operators working on premises for which a building permit has been issued, guards and supervisors as defined in the Act."

As indicated above, the General Counsel amended the complaint orally at hearing. The amended unit includes "drivers, checkers, helpers, warehousemen, dockmen, forklift operator, mechanic Class A, mechanic Class B, servicemen, partsmen, firemen within the jurisdiction of Teamsters Local 745" and retains the same exclusions alleged in paragraph 7 of the original complaint. (Tr. 28.) The Respondent did not object to the amendment, although it denied that the amended unit was appropriate for collective bargaining.

The recognition clause in the Respondent's 1993–1996 agreement with the Union does not include a specific unit description but instead refers to "all employees in the classifications of work covered by this Agreement." Appendix A to that agreement consists of three tables listing various classifications and wage rates. The first table refers to "Regular Employees (Maintained on Current Company Seniority Roster)" and does not pertain to any of the Company's workers. The second and third tables list the following classifications (wage rates omitted):

PART-TIME EMPLOYEES CASUAL EMPLOYEES:

Driver
Checker
Helpers
Warehousemen
Forklift Operators
Mechanic Class A
Paint and Body
Mechanic Class B
Serviceman
Partsman
Tireman

CONVENTION AND TRADE SHOWS

Part-Time Employees (Casual Employees)

Divers, Checkers, and Forklift Operators
Helpers, Warehousemen and Dockworker

(G.C. Exh. 2 at pp. 40–41.)

The unit described in the original complaint includes mechanics and shop employees. Mechanics are listed specifically

in the second table of Appendix A, but the term "shop employees" does not appear.¹⁴

The term "shop employee" arguably may include the serviceman, partsman, and fireman classifications which are listed in the second table of Appendix A. On the other hand, as noted, it is possible that the term "shop employee" could refer to some classification that was not covered by the collective-bargaining agreement, such as the decorators who build exhibits in the shops inside the Respondent's warehouse.

Interpreted in that way, the term "shop employee" would make the unit described in complaint paragraph 7 broader than the unit which the Respondent recognized when it signed the collective-bargaining agreement. I believe that the General Counsel amended this complaint paragraph, at least in part, to eliminate this confusing possibility. Thus, contrary to the Respondent's argument, at least this portion of the complaint amendment served to prevent the unit description from being broadened.

The alleged unit, as amended, does not include every classification listed for part-time and casual employees in Appendix A of the contract. Paint and body employees are left out, but there is no showing that the Respondent has employed any such workers.

I find that the amended unit description does not include any classification other than those listed in Appendix A of the collective-bargaining agreement. There is no danger that applying this unit description would force the Respondent to recognize the Union as the representative of employee classifications not covered by the contract which the Respondent signed.

On the other hand, the unit described in amended complaint paragraph 7 may be underinclusive, in the sense that it does not describe every classification of employee listed in the collective-bargaining agreement. However, this agreement covers a number of different employers who joined together to bargain as a group, and these various employers necessarily use different classifications of employees.

Considering that the Respondent withdrew from multiemployer bargaining, it is not surprising that the Respondent's own employee complement might not include all the classifications which were subject to the Contract. Yet, the fact that an employer's work force does not include all the classifications for which the union was recognized does not make the recognition invalid or the unit inappropriate. To assure that this obvious point does not overlook a subtlety in the Respondent's arguments, those specific arguments will be discussed in greater detail.

C. The Respondent's Specific Objections to Amended Unit

The Respondent states that the "unit, as amended at trial, includes five classifications which had not been employed under either of the agreements. The list of employees working since 1993 contains no wage rate equal to that for Mechanic Class B, Serviceman, Partsman, or Tireman."¹⁵ (R. Br. at p. 27.) The

¹⁴Potentially, the term "shop employees" could cause confusion in this case because the Respondent's main warehouse contains a number of shops where employees build trade show exhibits, some of them quite elaborate. The Union has not claimed to represent these employees and at least some of them, the decorators, are represented by another labor organization.

¹⁵Although the Respondent's brief states that the amended unit included "five classifications which had not been employed under either

record does not contradict the Respondent's assertion, but what is its legal significance?

Clearly, if the Respondent had continued as part of the multiemployer unit, it would not matter that it did not employ all classifications described in the contract. Other employers presumably had workers in these classifications, and those employees were part of the bargaining unit.

When the Respondent timely withdrew from the multiemployer unit, it created a separate, single-employer unit of the Respondent's employees, apart from the multiemployer unit which continued without the Respondent. The Board presumes that in such a situation, a union enjoys majority status in the single-employer unit as well as in the multiemployer unit. *Barney's Club*, 227 NLRB 414 fn. 3 (1976). However, this presumption of continuing majority status does not address the issue of whether the withdrawal from multiemployer bargaining has somehow rent the work force asunder in a way that makes the single-employer unit inappropriate.

In essence the Respondent claims that, by amending the unit alleged as appropriate in the complaint, the General Counsel is imposing on the Respondent a unit to which it never agreed. However, by signing the collective-bargaining agreement, the Respondent did, in fact, agree to a unit which included the Eve classifications of employees not present in the Respondent's work force. If there has been a narrowing of the unit, that is because the Respondent withdrew from the multiemployer unit. But does this narrowing of the unit make the General Counsel's unit description fatally defective?

The Respondent's argument might imply that, with respect to the five classifications it did not employ, signing the contract with the Union was tantamount to entering into an unlawful prehire agreement. That argument must be rejected. When the Respondent signed the collective-bargaining agreement, it was doing more than granting recognition to the Union. The Respondent was also consenting to a multiemployer collective-bargaining unit which did include employees in the five classifications. Since such employees had already been hired, by other members of the multiemployer group, no illegal prehire arrangement was involved.¹⁶

The Respondent's suggestion that the complaint amendment deviated from the bargaining unit actually in existence must also be rejected. The Respondent recognized a bargaining unit including all employee classifications covered by the collective-bargaining agreement, even though some of those classifications existed in the multiemployer unit but not in the Respondent's own work force.¹⁷ The General Counsel's efforts to describe this unit as faithfully as possible, by amending the Complaint, do not add any classifications to the unit beyond those which the Respondent already had agreed to recognize.

of the agreements" it went on to list only four classifications. Presumably, the classification inadvertently omitted was Mechanic Class A.

¹⁶ Moreover, the statute of limitations in Sec. 10(b) of the Act precludes the Respondent from raising as a defense that it recognized the Union unlawfully. This matter will be discussed below.

¹⁷ The recognition clause in the collective-bargaining agreement signed by the Respondent states, in part, "The Employer recognizes and acknowledges that the Local Unions affiliated with the Texas Conference of Teamsters are the exclusive representatives of all employees in the classifications of work covered by this Agreement, and supplements thereto for the purpose of collective bargaining as provided by the National Labor Relations Act." (R. Exh. 8, emphasis added.)

When an employer's work force does not include a classification of employees for which a union has been recognized as the exclusive bargaining representative, but still includes employees in other unit classifications, the absence of employees in one particular classification does create a difference between the unit description and the employer's payroll roster. However, the Respondent has cited no authority for the proposition that such a difference renders the unit inappropriate.¹⁸

Conversely, the Respondent also challenges the appropriateness of the unit alleged by the General Counsel on the ground that it does not include all classifications described in the collective-bargaining agreement. Again, the Respondent has cited no authority that it was error, fatal to the complaint, for the General Counsel to allege an appropriate unit which did not include all the classifications present in the multiemployer unit from which the Respondent withdrew. Since the Respondent does not employ, and has not employed, the classifications not included in the amended complaint paragraph 7, it is difficult to understand how their omission from the unit alleged in the amended complaint causes the Respondent any prejudice.

Additionally, the Respondent challenges the unit description in the complaint, as amended at trial, on the ground that it changes the identity of the parties with which the Respondent must bargain. Specifically, the Respondent contends that the General Counsel would require it to recognize and bargain with fewer unions than signed the collective-bargaining agreement. Since it seems a bit uncouth for an employer to complain that the Government is requiring it to bargain with too few unions, perhaps it would increase clarity to revisit the exact words of the Respondent's argument:

[T]he contracting parties are different from that for which General Counsel seeks bargaining from Respondent. The contract covers employees throughout the State of Texas, apparently all members in the Texas Conference of Teamsters . . . General Counsel's intent to enforce an obligation to bargain solely for one of the four bargaining agents attempts a unilateral modification of the bargaining relationship.

(R. Br. at 27.)

My analysis of this argument must begin by noting that the Respondent, not the General Counsel, already had modified the bargaining relationship in two ways. First, it made a timely and lawful withdrawal from the multiemployer unit, resulting in the creation of a separate unit of its employees. No party disputes the legality of this action.

Second, the Respondent withdrew recognition from the Union and refused to negotiate. The Respondent cannot easily contest this fact, because it stipulated to the authenticity of its September 26, 1996 letter to the Union, which denied that it had any duty to bargain. (G.C. Exh. 9.) Rather, the Respondent asserts that its action was lawful.

If the General Counsel is correct in alleging that the Respondent was under a duty to bargain, then the Respondent has committed an unfair labor practice which must be remedied.

¹⁸ The Respondent's brief does cite *J & R Tile*, 291 NLRB 1034 (1988), but for a different proposition. The Respondent states: "Even if one assumes that all [employees referred by the Union's hiring hall] were members [of the Union], an assumption implicit in questions asked by General Counsel and Charging Party, membership alone is insufficient to establish a designated majority." (R. Br. at p. 28.) However, this citation concerns the issue of the Union's majority status, not an issue regarding the appropriateness of the bargaining unit.

The remedy involves requiring the Respondent to do what it has a legal obligation to do. If the Respondent has no legal duty to bargain with other Teamsters locals besides the Charging Party, then the remedy should not force it to do so.

The language of the collective-bargaining agreement may leave room for differences of opinion, but I do not interpret it as granting recognition to other Teamsters locals besides the Charging Party. In my view, it is most reasonable to read the contract as conferring recognition on the Teamsters local in the territorial “jurisdiction” of which the employer is located. In the Respondent’s case, that Local Union is the Charging Party.

However, the contract does contain a provision requiring that when an employer “opens an operation in any city in the State of Texas” it will give “recognition to the Local Union whose jurisdiction the operation is in. Recognition in this Contract shall apply.” (R. Exh. 8.) This language may form the basis for the Respondent’s argument that the contract “covers employees throughout the State of Texas” and that the complaint is defective because it does not allege a bargaining unit of similar geographical scope.

However, I do not read this language as establishing a state-wide, multilocation bargaining unit. For one thing, the provision is contingent on the Respondent performing work in a given locality. Moreover, a clause which pledges an employer to extend the union’s recognition to new groups of employees must be viewed with some concern, because it curtails the employees’ right to freedom of choice in deciding whether to have a bargaining representative and, if so, who that representative should be. Therefore, the Board has limited the effect of such contractual language.

In *Ebon Services*, 298 NLRB 219 (1990), an employer tried to justify its refusal to sign a collective-bargaining agreement on the basis that it had not agreed to a clause requiring it to recognize the union and apply the terms of the contract at all of its facilities, including those that might be acquired in the future. In general, the duty to bargain includes a duty to reduce to writing any oral agreement reached, and to sign the written version, if the other party requests it. The Board held that if an employer agreed to the language described above, the employer could not avoid its statutory duty to sign the contract by arguing that the language was offensive to the employees’ statutory rights.

However, the Board stated, in effect, that it would limit the legal effect of that clause to protect employee rights:

[W]e note that, under established Board precedent, the presence of such a provision does not absolve the Respondent from its statutory duty to sign a contract containing it, if the Respondent has agreed to do so. [Citing *Frazier’s Market*, 197 NLRB 1156, 1157 (1972).] The Board, however, will not compel employees at the Respondent’s other facilities to be subject to the provisions of this contract, if those employees would constitute a separate appropriate unit, without affording them an opportunity to express their preferences for representation by the Union. [298 NLRB at 219.]

In view of this Board precedent, as well as the contingent nature of the clause in question, I cannot agree with the Respondent that the collective-bargaining agreements it signed with the Charging Party created a unit covering employees throughout the State of Texas.

Moreover, the contractual language also reflected the broad geographic scope of the multiemployer unit. An employer-

member of that unit in Houston, for example, would deal with the Houston Teamsters Local as the representative of its employees. When the Respondent withdrew from the multiemployer unit, it meant, in effect, that the bargaining unit which the Company and Union shared no longer was spread out across the State. This change resulted from the Respondent’s lawful withdrawal from multiemployer bargaining, not from any action of the General Counsel.

Additionally, the record does not establish that any Teamsters local union besides the Charging Party ever demanded recognition or tried to negotiate on behalf of the Respondent’s employees. The complaint does not allege that the Respondent broke an obligation to bargain with any union except the Charging Party.

In proposing a remedy for the unfair labor practices alleged in this case, the General Counsel necessarily will seek an order to restore the status quo ante, that is, the status quo existing before the unfair labor practices changed it. At the time the Respondent withdrew recognition, that status quo involved a single-employer unit at Irving, Texas, not the larger multiemployer unit to which the Respondent belonged when it signed the contract in 1993.

The Respondent contends that the General Counsel has changed the bargaining relationship which the parties to the collective-bargaining agreement shared. However, the exact opposite is true. It would cause a departure from the historic relationship existing when the Respondent withdrew recognition if the General Counsel did require the Respondent to recognize and bargain with other unions besides Local 745. Therefore, I must reject the Respondent’s argument.

The last of the Respondent’s challenges to the unit alleged in the complaint, as amended, appears to be an amalgam of its other arguments. However, at its core lies the premise that the unit alleged in the amendment to complaint paragraph 7 is too vague and ambiguous to be ascertained:

At no time did Local 745 or any other Teamster affiliate request bargaining in a unit as circumscribed by the Complaint amendment. Whether or not it be an appropriate unit, there was never a request to bargain in a unit consisting of new classifications involving a geographical restriction coextensive with the jurisdiction of Local 745. As pointed out previously, there has been no showing of majority support in any unit. The ambiguous unit newly created by General Counsel is impossible of measurement. No one knows who is in it.

(R. Br. at pp. 27–28.)

To the contrary, the unit alleged in the amended complaint is quite clear. It consists of the Respondent’s employees in specified classifications. Moreover, the Respondent’s argument that the Union never requested to bargain in this unit flies in the face of the Charging Party’s repeated requests to bargain, documented in the record.

Certainly, the Union never *specifically* made a request to bargain which included a unit description identical with that alleged in the amended complaint. It didn’t have to. The parties well understood what unit the tarpon referred to when it requested to bargain.

In my view, the record raises some significant questions about the appropriateness of the unit alleged in the complaint, as amended, and these issues will be discussed below. How-

ever, I do not believe the unit description fairly can be criticized as being vague.

I find that complaint paragraph 7, as amended, accurately describes the unit which existed after the Respondent's withdrawal from multiemployer bargaining. The classifications in the unit derive from those listed in Appendix A of the collective-bargaining agreement under the heading "Part-Time Employees, Casual Employees" and it does not include any classifications not listed in this contract. Since the Respondent signed this agreement, it can hardly dispute that, at the time of signing, it recognized the Union as the representative of employees in those classifications.

In sum, I find that the complaint, as amended, does not seek to change either the scope of the bargaining unit, as it existed after the Respondent's withdrawal from multiemployer bargaining, or the identity of the unit employees' representative. I must reject the Respondent's arguments to the contrary.

D. The "Casual Employee" Issue

Another issue exists which the parties have addressed only in passing, if at all. However, I would be remiss if I failed to note for the Board my concerns about the appropriateness of this unit. Counsel refers to as "casuals."

From examination of the collective-bargaining agreements, it appears very likely that the original multiemployer bargaining unit included full-time and regular part-time employees as well as individuals who performed work only when large trade shows made additional workers necessary. Under established Board principles, when an employer makes a timely withdrawal from such a multiemployer unit, its employees who had been part of the multiemployer unit then make up a separate, single-employer bargaining unit.

In this case, however, there is an unusual twist. Since the Respondent's withdrawal from multiemployer bargaining, the resulting unit of its employees has consisted totally of individuals referred by the Union's hiring hall for brief periods of work when needed. Thus, the General Counsel's brief states, in part, as follows:

The agreements [signed by the Respondent] covered full-time employees, part-time employees and casual employees in the case of Respondent and Local 745, the only employees covered by the agreements were casual employees used to provide drayage services . . . [B]ased on the parties' bargaining history, a unit of casual employees who perform drayage services should be found appropriate herein.

(G.C. Br. at pp. 5-6.)

In labor law, "casual employee" is a term of art. A respected text provides this definition: "Casuals are those employees who lack a sufficient community of interest with regular employees to be included in the bargaining unit. They must be differentiated from regular part-time employees, who are included in the unit." Morris, *The Developing Labor Law*, 2d ed., at p. 1491 (citations omitted). Applying this definition would therefore make a "unit of casual employees" appear to be a contradiction in terms.

However, Board decisions treat this issue with much more subtlety than the textbook definition quoted above suggests. In following its statutory mandate to "assure to employees the fullest freedom in exercising the rights guaranteed by this

Act,"¹⁹ the Board carefully takes into account the unique circumstances of the industry involved.

For example, employers in the motion picture industry hire certain types of employees for the brief periods of time they are needed to make a movie. After completing work on one film, these individuals may be hired by another company to work on a different project. Thus, they are "casual employees" in the same sense that the employees at issue here are "casual employees," working for various companies as the need arises.

In *Median, Inc.*, 200 NLRB 1013 (1972), and *American Zoetrope Productions, Inc.*, 207 NLRB 621 (1973), the Board applied special eligibility standards to take into account that "employees in the [motion picture] industry are hired for a particular production, sometimes only for a day's work, and then laid off without any promise of reemployment. When work is again available the employer recalls those who have proved satisfactory in the past." The Board further stated, "On the basis of this irregular pattern of employment, as we said in *Median*, supra, it is our responsibility to devise an eligibility formula which will protect and give full effect to the voting rights of those employees who have a reasonable expectancy of further employment with the Employer." *American Zoetrope Productions, Inc.*, supra at 622.

In the motion picture cases, the Board did establish criteria which allowed employees to be represented by a labor organization, if they so chose, even though an employee expected to work for an employer only briefly, at any given time. In light of these and similar cases, I conclude that the Board would not find the current unit to be inappropriate because it consists exclusively of casual employees. Rather, the Board would endeavor, as in the motion picture cases, to give full effect to the voting rights of the casual employees who had a reasonable expectancy of further employment.

Since it is my job to find facts, not make policy, and because this case does not require me to determine who could, or could not vote in a Board-conducted election, it is neither necessary nor appropriate for me to propose an eligibility standard for on-call employees in the exposition and trade show industry. On the other hand, it would be assuring to know that if this bargaining unit had to stand before the Board and be judged as fit or unfit for an election, it would pass muster.

As the Board recently stated in *Saratoga County Chapter NYSARC Inc.*, 314 NLRB 609 (1994), under "the Board's longstanding and most widely used test" to determine the eligibility of on-call employees to vote in a representation election, "an on-call employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date. *Davison-Paxon Co.*, 185 NLRB 21 (1970)."²⁰

¹⁹ 29 U.S.C. § 159(b).

²⁰ The Board also applied the *Davison-Paxon* test in *Trump Taj Mahal Casino*, 306 NLRB 294 (1992), in considering who should be included in a unit of stage technicians, convention lounge technicians, and entertainment event technicians. Although the job duties of these technicians differ considerably from those of the employees at issue in this case, the "on call" nature of their work presented similar questions. The Board wrote:

In determining whether on call employees should be included in the bargaining unit, the Board considers whether the employees perform unit work, and those employees' regularity of employment. Here, it is undisputed that the employees denominated "casu-

Applying the *Davison-Paxon* test to the evidence in this case presents something of a problem, because the documents do not show how many hours an employee worked each week or even how many hours an employee worked during a quarter.²¹ However, in some instances, the necessary information can be inferred indirectly from the records in evidence.

The collective-bargaining agreement expired July 31, 1996, and the Respondent stopped using the Union's referral service the next day. I will assume that the period of April, May, and June 1996, that is, the quarter before withdrawal of recognition, is analogous to the "last quarter prior to the eligibility date" in the *Davison-Paxon* test.

Clearly, employee Marty Carrington, who worked 1069.5 regular hours and 193.75 overtime hours for the Respondent during the first 7 months of 1996 (G.C. Exh. 11), met the *Davison-Paxon* test. Assuming that a calendar quarter has 13 weeks and that "full-time -employment" constitutes 40 hours a week,²² there would be 520 "regular" (nonovertime) hours in a quarter. Carrington's regular hours exceeded twice this amount, so I have no doubt that during the second calendar quarter of 1996, he averaged 4 or more hours of work per week.

Employee Michael Carson began work for the Respondent on March 25, 1996, and his last paycheck was dated July 5, 1996. During that period²³ he worked 93 regular and 25 overtime hours, for a total of 118 hours. (G.C. Exh. 11.)

To determine how many hours he worked during the second calendar quarter, I will assume that he worked a full 8 hours per day on March 25 through 29, 1996, and therefore will subtract 40 hours from the 118 hours worked. Additionally, as noted, I will assume that he worked 8 hours per day on July 1 through 3, 1996, and will subtract those 24 hours. After subtracting these hours, which Carson may have worked outside the second

calendar quarter of 1996, Carson's work for the Respondent totals 54 hours, which I will assume he worked during April, May, and June 1996.²⁴

Dividing those 54 hours by 13, the number of weeks in the calendar quarter, yields 4.15 hours per week, which exceeds the 4 hours per week minimum of the *Davison-Paxon* test. Based on these calculations, I find that there is a high probability that at least two employees, Carrington and Carson, satisfy this test.

It is important to emphasize that I have used the *Davison-Paxon* test as a kind of litmus paper, providing a useful approximation but not a true, quantified answer. Additionally, I have kept in mind that the test was designed for another purpose, and that the data are less than optimal.

For these reasons, I do not believe the calculations described above are sufficient, standing alone, to resolve the issue of whether the employees in this unit share the requisite community of interest, including the expectancy of future employment by the Respondent, necessary to establish that the unit is appropriate. However, I believe the *Davison-Paxon* test does afford useful guidance regarding Board policy in this novel area, and it also serves as kind of a "cross check" to test the conclusions I reached after considering other evidence.

The results of the *Davison-Paxon* analysis are consistent with my conclusion that, but for the withdrawal of recognition, a significant number of employees in the unit had a reasonable expectation of continued employment with the Respondent. This conclusion is based on a number of factors, including General Counsel's Exhibit 11, which shows that the employees who worked the greatest number of hours in 1996 had begun working for the Respondent in previous years.

Carrington, for example, began in March 1995. Employee Doyle Irby, who worked 607 hours in 1996, began with the Respondent in September 1995, and Donna French, who worked 472 hours in 1996 began working for the Respondent in October 1993. (G.C. Exh. 11.)

Of the 61 unit employees who worked for the Respondent at least 90 hours in 1996, 51 had worked for the Respondent in a previous year. Only 10 had begun working for the Respondent in 1996. (G.C. Exh. 11.) When this information is considered together with the contractual requirement that the Respondent use the Union's hiring hall as its first source, the conclusion becomes compelling that many of the employees in the unit had a reasonable expectancy of continued employment with the Respondent. I so find.

The number of persons actually employed in unit jobs varies considerably from day to day, depending on whether the Respondent is then responsible for a trade show and, if so, the size of the exposition. The Respondent does not point to any period, before the expiration of the 1993-1996 contract, in which it used no unit employees. However, Board precedents establish that even a temporary reduction in unit size to zero employees would not relieve the Respondent of the duty to bargain. See, e.g., *Finger Lakes Plumbing & Heating Co.*, 253 NLRB 406 fn. 3 (1980); and *Coastal Cargo Co.*, 286 NLRB 200 (1986).

In other respects, the evidence establishes that employees in the bargaining unit shared a strong community of interest. As noted above, all of them performed work connected with the

als" perform unit work. The Board has found that regularity can be satisfied when an employee has worked a substantial number of hours within the period of employment prior to the eligibility date. See, e.g., *Mid-Jefferson County Hospital*, 259 NLRB 931 (1981). Under the Board's longstanding and most widely used test for voter eligibility, applied in this case by the Regional Director, an on-call employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date Although no single eligibility formula must be used in all cases, the *Davison-Paxon* formula applied by the Regional Director is the one most frequently used absent a showing of special circumstances.

(306 NLRB at 295.)

²¹In *Saratoga County Chapter NYSARC, Inc.*, supra, the Board rejected a hearing officer's recommendation that an employee must work an average of 4 hours per week during the preceding year, rather than in the last quarter before the eligibility date. Therefore, the fact that the records can provide an employee's average weekly hours over the first 7 months of 1996 does not help determine whether the employee meets the *Davison-Paxon* test.

²²Art. 3 of the 1993-1996 collective-bargaining agreement provided that a "guaranteed work week shall be forty (40) hours per weektime and one-half (1 1/2) after eight (8) hours per day and/or forty (40) hours per week." (G.C. Exh. 2 at 3.)

²³At least in the case of Marty Carrington, there appeared to be a "lag time" between the date last worked, July 31, 1996, and the date of his last paycheck, August 9, 1996. If this lag time is typical, then it is highly unlikely that Carson worked in July 1996, even though his last paycheck was dated July 5, 1996. However, to err on the side of caution, I will assume that Carson did 8 hours' work on July 1, 2, and 3, 1996, but did not work on the July Fourth holiday or the next day.

²⁴I have tried to make assumptions which, if anything, overestimate the number of hours Carson worked outside the second calendar quarter of 1996. However, the calculation is still based on assumptions which cannot be corroborated by evidence in the record, and I consider the result only likely, but not certain.

transportation of freight. None of them was involved in the design or construction of exhibits. At the show site, other employees, not in the bargaining unit, put the exhibits together, then later took them apart and packed them.

When the bargaining unit employees came into contact with the work product of these nonunit employees, it was ready for shipment. At that point, the product was packed for transportation and most easily could be described not in terms of its craftsmanship or artistry, but rather, simply, as freight.

The record suggests that at least some of the nonunit employees involved in building the exhibits were represented by another labor organization, which came into conflict with Teamsters locals over the assignment of certain truck driving work. Such conflicts also serve to mark the boundaries of the community of interest which united the bargaining unit employees when others appeared to them to interlope on their work.

Finally, the collective-bargaining agreement itself provides persuasive evidence of the community of interest shared by the bargaining unit employees. It established a method of referral and hire not used by other workers, set separate wage and benefit rates, and provided for a separate grievance procedure. For all of these reasons, I find that the unit described in paragraph 7 of the complaint, as amended, constitutes an appropriate unit for collective bargaining.

2. Representation under Section 9(a) of the Act

Paragraph 9 of the complaint alleges that at all times since May 1992, the Union has been the exclusive representative of the bargaining unit based on Section 9(a) of the Act. The Respondent disputes that it recognized the Union under Section 9(a) of the Act, and instead asserts that it granted limited recognition under Section 8(f), which provides for the building and construction industry an exception to the rule that an employer may not grant a union status as the exclusive representative of employees in a unit until a representative complement of such employees has been hired, and a majority of those employees has chosen the union to represent them.

At the outset, there may be a question as to which party carries the burden of proof. The General Counsel, of course, bears the burden of proving the allegations in the complaint, including the allegations necessary to establish that the Union is the exclusive representative of the unit employees under Section 9 of the Act. Since Section 8(f) creates an exception to the general principles of union recognition which Congress established in Section 9 of the Act, the party seeking the benefits of this exception has the burden of proving that it applies.²⁵

In view of the General Counsel's burden of proving the complaint allegations, this analysis will begin with a discussion of the types of proof needed to establish that a union enjoyed status as the majority representative of an appropriate unit of employees under Section 9 of the Act, that the employer had a

duty to bargain with the union, and that the employer broke that duty.

Depending on the case, the necessary evidence of a union's majority status might be a certification of representative after a Board-conducted election, or authorization cards signed by a majority of unit employees. Here, the General Counsel relies on another form of evidence, a collective-bargaining agreement signed by the Respondent, which includes the recognition clause discussed above. The General Counsel also relies on legal presumptions that a union's majority status continues after the collective-bargaining agreement has expired, and that such majority status carries over into a single-employer unit created when an employer timely withdraws from multiemployer bargaining.

These presumptions draw strength from several common sense principles. With the limited construction industry exception discussed below, the Act makes it illegal for a company to choose a union for its employees. Congress recognized that a "sweetheart" or "company union" forced on employees by management would defeat both the employees' right to choose their own representatives, and their right to bargain collectively.

Therefore, in general, the Act makes it an unfair labor practice for a company to . . . dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it. 29 U.S.C. § 158(a)(2). If a company grants recognition to a union as the exclusive bargaining representative of a unit of employees, at a time when a majority of those employees haven't selected the union, that action violates this provision of the law, because conferring recognition is a very powerful form of support.

Common sense, of course, underlies the principle that one side should not have the right to choose the other side's representatives, or even to influence that choice.²⁶ Other basic principles of fairness also undergird the presumptions on which the General Counsel relies.

One basic concept is that the Government will not lightly assume someone has broken the law. Applied to the present case, I will not assume, and cannot conclude, that the Respondent broke the law when it recognized the Union initially.

From common sense also springs the principle that if a person has, in fact, engaged in wrongdoing, the law should not allow him to benefit from it. For example, assume that a company did enter into a "sweetheart deal" with a friendly union, to keep its employees from choosing a more aggressive organization to represent them. If so, it should not be allowed to use its own unlawful conduct as a convenient way to get out of its responsibility after the kitten it adopted has grown into a mountain lion.

In some instances, including this case, an employer may contend that when it recognized the union, it doubted that a majority of unit employees had chosen the union; nonetheless, the employer felt "coerced" into entering into a bargaining relationship. However, the law grants an employer alternatives to being compelled to recognize and bargain with a union which has not been chosen by a majority of bargaining unit employees.

²⁵ *Carpet, Linoleum & Soft Tile Local 1247 (Indio Paint & Rug Center)*, 156 NLRB 951 (1966); and *Bell Energy Management Corp.*, 291 NLRB 168 (1988). In *Golden West Electric*, 307 NLRB 1495 (1992), the Board held that for an employer in the building and construction industry, the burden of proof rested with the party asserting that the employer's relationship with the union was based on Sec. 9(a) of the Act. However, *Golden West Electric* does not affect the allocation of burdens of proof in this case because the Respondent must first prove that it is an employer primarily engaged in the building and construction industry, before it can benefit from a presumption that it recognized the Union under Sec. 8(f).

²⁶ Just as it is an unfair labor practice for a company to impose a union on its employees, it is unlawful for a union to restrain or coerce an employer in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances. 29 U.S.C. § 158(b)(1)(B).

If a union demands that an employer recognize and bargain with it, but management has doubts, the company can ask the Board to conduct a secret-ballot election to find out. 29 U.S.C. § 159(c)(1)(B). Similarly, if a company believes it is being coerced into recognizing a union which lacks majority support, it can file an unfair labor practice charge with the Board under 29 U.S.C. § 158(b). However, because of a statute of limitations, to raise such issues before the Board, the employer must take timely action.

The statute of limitations contained in Section 10(b) of the Act, 29 U.S.C. § 160(b), precludes the Government from prosecuting an employer or union for an unfair labor practice which allegedly occurred more than 6 months before an unfair labor practice charge was filed. Therefore, an employer risks no penalty by asserting that it acted unlawfully in recognizing a union, if it waits until after the statute of limitations has run before making this claim. Under Board doctrines which the Supreme Court has upheld, such an employer also will derive no benefit from such an admission, because its silence for 6 months creates the presumption that the union had been lawfully recognized.

The Supreme Court settled this point nearly four decades ago in *Machinists Local Lodge 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960). In that case, the Court made an important distinction which has direct relevance to this case. On the one hand, the Court held, the Board may consider evidence that an unfair labor practice had been committed even though the statute of limitations precluded prosecution. It did not violate the statute of limitations to use such evidence to show the true significance of more recent events which could still be prosecuted.

However, in some situations, the lawfulness of a recent action may depend on the lawfulness of an older event which the statute of limitations has placed beyond reach. In those instances, the Court held, the law prohibits the Board from going back and deciding the lawfulness of the ancient events as a predicate to determining whether a recent unfair labor practice has been committed.²⁷ This principle protects parties from having to defend against old unfair labor practice allegations after records have been destroyed in the ordinary course of business and memories have gone stale. But just as it removes a possibility of prosecution, the statute of limitations equally takes away a possible defense.

Just as the government may not seek to prove a time-barred unfair labor practice as a necessary element of its prosecution, so a respondent may not establish such an old unfair labor practice to support its defense. In this case, that means that the Respondent is presumed to have acted lawfully in recognizing the Union, and cannot dispute that fact now. The Board has articulated this principle in numerous cases, and expressed it as follows in *Jim Kelley's Tahoe Nugget*, 227 NLRB 357 (1976):

²⁷In this situation, the Supreme Court held,

the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Bryan Mfg. Co., 360 U.S. at 416-417 (footnotes omitted).

The Board has held, in light of the Supreme Court's decision in *Bryan Manufacturing Co.*, that a respondent may not defend against a refusal to bargain allegation on the grounds that original recognition, occurring more than 6 months before charges had been filed in the proceeding raising the issue, was unlawful. Any such defense is barred by Section 10(b) of the Act, which, as the Court explained in *Bryan*, was specifically intended by Congress to apply to agreements with minority unions in order to stabilize bargaining relationships. That means that Respondent cannot now attack the Union's majority status among its employees . . . and that we must accept as a fact that the Union represented a majority in that unit at that time.

The Board has consistently presumed that a voluntarily recognized union continues to be the majority representative of the unit employees. *This presumption is earned throughout the life of the collective-bargaining contract and thereafter.* We do not think that a different result should obtain in this case.

227 NLRB at 357 (emphasis added, footnotes omitted).

The Supreme Court has recognized the important role of such presumptions in promoting stability in union-management relationships, an important statutory goal. In *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996), the Court stated:

The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes To such ends, the Board has adopted various presumptions about the existence of majority support for a union within a bargaining unit, the preconditions for service as its exclusive representative The first two are conclusive presumptions. A union "usually is entitled to a conclusive presumption of majority status for one year following" Board certification as such a representative²⁸ A union is likewise entitled under Board precedent to a conclusive presumption of majority status during the term of any collective-bargaining agreement, up to three years.

There is a third presumption, though not a conclusive one. At the end of the certification year or upon expiration of the collective-bargaining agreement, the presumption of majority status becomes a rebuttable one. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990) [A]n employer may overcome the presumption (when for example, defending against an unfair labor practice charge) "by showing that, at the time of [its] refusal to bargain, either (1) the union did not *in fact* enjoy majority support or (2) the employer had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, supra at 778 (emphasis in original).

(517 U.S. at 785-786.)

One other presumption also applies to the present case. Basically, it involves an extension of the presumption of a union's continuing majority status to a situation in which a new bargaining unit has come into existence when an employer withdraws from multiemployer bargaining. The presumption that

²⁸Citing *Fall River Dyeing, v. NLRB*, 482 U.S. 27, 37 (1987).

the union represents a majority of unit employees survives the Employer's withdrawal from a multiemployer bargaining unit.

The Board described this presumption, with language so plain it is beyond dispute, in *Barney's Club*, 227 NLRB 414 fn. 3 (1976): "[T]he Union's presumption of majority status based on its recognition as the bargaining representative for the Respondent's employees as part of a multiemployer unit survived the Respondent's timely withdrawal from that unit and the shift to bargaining on a single-employer basis." See also *Nevada Lodge*, 227 NLRB 368 fn. 3 (1976).

Applying these principles to this case creates the following framework for evaluation of the evidence: (1) By proving that the Respondent recognized the Union and entered into a collective-bargaining agreement with it, the General Counsel has established a rebuttable presumption that the Union now continues to enjoy support from a majority of bargaining unit employees, (2) The Respondent may rebut this presumption with evidence showing that at the time it withdrew recognition, it had a good-faith doubt about the Union's majority status which was "founded on a sufficient objective basis," with evidence showing that the Union did not in fact enjoy majority support. (3) Because the Respondent recognized the Union more than 6 months before the filing of the unfair labor practice charge in this case, the Respondent may not rebut the presumption by challenging the Union's majority status at the time the Respondent granted recognition to it.

The General Counsel has introduced into evidence a collective-bargaining agreement signed by the Respondent in 1993. This Agreement confers recognition on the Union. The Respondent does not deny entering into this collective-bargaining agreement and an earlier one, but does attempt to raise the circumstances as a defense. However under the principles of *Bryan Mfg. Co.*, supra, and *Jim Kelley's Tahoe Nugget*, supra, I cannot consider those circumstances, which took place more than 6 months before the filing of the unfair labor practice charge.

Applying the presumptions described by the Supreme Court in *Auciello Iron Works*, supra, and by the Board in *Barney's Club*, supra, I find that the General Counsel has met his burden of proving that the Charging Party had been recognized as the exclusive representative of the employees in the unit described in the complaint, as amended. Additionally, the record clearly establishes that the Respondent ceased using the Union's hiring hall on about August 1, 1996. The evidence also establishes that the Respondent engaged in this action without providing the Union notice and opportunity to bargain over these changes which, I find, concerned mandatory subjects of collective bargaining, and their effects. Additionally, I find that the Respondent withdrew recognition from the Union on about September 26, 1996.

The Respondent did not present any evidence to establish that, at the time it withdrew recognition, the Union did not in fact enjoy majority support among the unit employees. The Respondent also did not try to show that it had a "good-faith" doubt founded on a sufficient objective basis, that a majority of unit employees continued to support the Union. Therefore, the Respondent has not rebutted the General Counsel's case.

However, the Respondent has raised certain defenses, including that it is an employer primarily engaged in the building and construction industry, and that it recognized the Union under Section 8(f) of the Act. If so, it was privileged to withdraw

recognition on the expiration of the collective-bargaining agreement.

3. The Respondent's 8(f) defenses

In passing the Labor-Management Reporting and Disclosure Act of 1959 (commonly called the "Landrum-Griffin Act" after its sponsors) Congress recognized that the building and construction industry presented unusual circumstances. The Congressional Record for August 11, 1959 reports Congressman Griffin's explanation of the reasons he considered such legislation necessary:

Legislation authorizing prehire agreements in the construction industry is necessary because the industry cannot conform to the present law. The NLRA was written for mines, mills, factories, and similar establishments with a stable working force. The employees on the payroll may choose a bargaining representative which will thereafter negotiate with the employer an agreement fixing wages, hours, and other terms and conditions of employment. The Act incorporates the principle of majority rule in choosing a representative. Therefore, no representative can be chosen and no contract can be negotiated until the employer has hired a sufficient number of employees. "NLRB 16th Annual Report," page 149; *Bernhard-Altman Texas Corp.*, 122 NLRB No. 148 (1959).

Collective bargaining agreements must be negotiated in the construction industry before the employees are hired.

Second, many projects involve work of such short duration that the work would be completed long before a collective bargaining agreement could be signed, if the recognition of an exclusive bargaining representative had to be postponed until the peak number of employees were at work on the project.

Third, it is manifestly inefficient to negotiate a separate contract for every project; therefore, the building trades unions and contractors follow the practice of working out a scale of wages and other terms of employment which will be applicable to all projects with a specific geographical area for a substantial period of time.

The result is that employers and unions in the construction industry have been in continuous violation of the [National Labor Relations Act] ever since 1947. The legal validity of the collective bargaining agreements will remain questionable until Congress acts.

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, page 1577, quoting Congressional Record of August 11, 1959.

The Landrum-Griffin Act added Section 8(f) to the National Labor Relations Act.²⁹ That provision made it lawful for an

²⁹ Sec. 8(f) provides, in part: "It shall not be an unfair labor practice under subsecs. (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in Sec. 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of Sec. 9 of this Act prior to the making of such agreement"

employer primarily engaged in the building and construction industry to recognize a union even though the union then did not represent a majority of unit employees.

The 8(f) exception therefore runs contrary to the principles that an employer should have no say in the selection of the employees' representative, and that such a representative may not be chosen until a representative complement of employees has been hired. To protect the employees' right to freedom of choice, Congress wrote into Section 8(f) a provision that if an employer and union entered into a collective-bargaining agreement under Section 8(f), it would not bar the Board from conducting an election during the contract's term.³⁰

Moreover, if a construction industry employer has entered into a contract with a union solely pursuant to Section 8(f) it is free to terminate the bargaining relationship when that agreement has expired.³¹ Since the agreement was not based upon the union enjoying majority status, it does not create a presumption that majority status survives the expiration of the contract.³² Such status cannot survive if it did not exist.

Here, the Respondent asserts that it falls within the statutory meaning of an employer primarily engaged in the building and construction industry, and that it recognized the Union solely under Section 8(f) of the Act.³³ If it did so, neither the act of recognition nor entering into a collective-bargaining agreement would create a presumption of 25 majority status.

Determining whether the Respondent recognized the Union under Section 8(f) begins with the question, *can* it recognize a union under that provision. The facts must establish three conditions before an employer can enter into an 8(f) agreement with a union:

1. The employer must be primarily engaged in the building and construction industry.
2. The employees covered by the agreement must, upon their employment, be engaged in the building and construction industry.
3. The union must be a labor organization of which building and construction employees are members.

See 29 U.S.C. § 158(f); *John Deklewa & Sons*, 282 NLRB 1375 (1987). Unless the record establishes all three requirements, the Respondent's 8(f) defense must fail.

A. Is the Respondent Primarily Unnamed in the Building and Construction Industry?

Both the Charging Party and General Counsel rely heavily upon *Animated Displays Co.*, 137 NLRB 999 (1962). Although

Provided, That nothing in this subsection shall set aside the final proviso to Sec. 8(a)(3) of this Act; *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Sec. 9(c) or 9(e)."

³⁰Entering into an agreement with a union which does not enjoy majority support in an appropriate bargaining unit would be unlawful unless falling within 8(f)'s exemption for the construction industry. Such an agreement "shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) of this title." 29 U.S.C. § 158(f) (concluding proviso).

³¹*John Deklewa & Sons*, 282 NLRB 1375 (1987).

³²See, e.g., *Comtel Systems Technology*, 305 NLRB 287 (1991).

³³The Board has stated that the burden of showing that an employer is primarily engaged in the building and construction industry lies with the party seeking to avail itself of the 8(f) exemption. *Carpet, Linoleum & Soft Tile Local 1247 (India Paint & Rug Center)*, 156 NLRB 951 (1966).

certain facts in that case are very similar to the record here, I do not believe the case is controlling precedent on whether the 8(f) exemption applies.

Animated Displays did involve an employer engaged in the "design, manufacture, fabrication, and distribution of exhibits and displays used for decorative or advertising purposes." 137 NLRB at 1014. The employer and union had agreed to a union-security clause which would be legal only if the employer were primarily engaged in the building and construction industry. Although the parties appealed certain of the other findings of the trial examiner, they did not appeal his finding about the union-security clause.

When the Board reviewed the case on appeal, it addressed the 8(f) issue only in a footnote which stated:

The Trial Examiner's finding that Respondents violated the Act because of the union-security clause in their contract was not excepted to and we adopt it *pro forma*.

(137 NLRB at 999 fn. 1.)

The term *pro forma* suggests "that the decision was rendered not on a conviction that it was right, but merely to facilitate further proceedings." *Black's Law Dictionary*, citing *Cramp & Sons S & E Bldg. Co. v. Turbine Co.*, 228 U.S. 645 (1913). Since the Board took care to include this caveat in its *Animated Displays Co.* decision, I will take care to heed it.

Other decisions do express the Board's reasoning in determining whether an employer meets the statutory requirements for the 8(f) exemption. In *Construction, Building Materials & Misc. Drivers, Local 83 (Various Employers)*, 243 NLRB 328 (1979), the Board observed that the Act did not define the term "building and construction industry."

It quoted the definition proposed by the trial examiner and approved by the Board in *Indio Paint*,³⁴ that building and construction involved "the provision of labor whereby materials and constituent parts may be combined on the building site to form, make or build a structure." Then, it described how it had applied this definition:

[T]he Board has found that Section 8(f) applies to employers who provide both labor and materials for construction without regard to whether the greater amount of revenue comes from the labor or from the materials. The exemption has also been applied to employers whose general business is not in the industry, but who are engaged in construction work on a specific project. In addition, Section 8(f) has been applied to companies engaged in the general contracting business which involves employees working and performing services at construction sites, such as sheet metal contractors. However, the 8(f) exemption has been denied to employers whose business involves the manufacture of construction materials which are installed by employees of a different employer and to employers who have only a minimal involvement in the construction process.

(243 NLRB at 331.)

Literally, the Respondent's operation would seem to fall within the "provision of labor whereby materials and constituent parts may be combined on the building site to form, make or build a structure." Its employees build exhibits and displays

³⁴ *Carpet, Linoleum & Soft Tile Local 1247 (Indio Paint & Rug Center)*, 156 NLRB 951, 959 (1996).

at the shops in its warehouse, take them apart, and reassemble them in convention and exhibit halls.

However, Section 8(f) requires an employer to do more than perform some building and construction. To qualify for the exemption, an employer must be engaged, and primarily engaged, in the building and construction industry.

As the Charging Party's brief stated, in a slightly different context, the fact that "certain of [Respondent's] employees use a hammer, a screwdriver, or saw, in setting up or dismantling prefabricated exhibits," does not signify that they are primarily engaged in the building and construction industry.³⁵ However, the converse could also be true. A contractor which relied upon subcontractors to perform the carpentry, electrical work and plumbing, for example, and whose own employees rarely used a hammer, screwdriver or saw, might still be engaged primarily in the building and construction industry if the general contractor's mission, seeing that structures got built on time and within budget, involved it directly in the construction process.

Perhaps for this very reason, the Respondent vigorously asserts that it is a general contractor in the building and construction industry. More particularly, it contends that it is a general construction contractor specializing in building exhibits for trade shows. Thus, at the hearing, the Respondent took care to analogize its functions to those of a general contractor engaged in the construction of homes or other buildings.

The point of this argument, I believe, is that a general contractor does far more than actually put up buildings, so its nature should not be judged based on what percentage of its revenues paid workers to saw, hammer, weld, or rivet. The Respondent must make this argument, that work in the building and construction industry includes a general contractor's administrative functions, because building displays and exhibits constitutes only a small part of the Expo Group's work. The Respondent concedes as much in its brief:

Of the services Respondent provides, the only work which may be construction related is limited to its construction of elaborate displays, whether they be backdrops for a stage, store fronts for a specific exhibit or steps leading to a stage. [R. Exhs. 4, 16.] These displays are primarily built at its Hurt Street facility and reassembled at the show sites. After the exhibitions, the displays are dismantled or stored at Respondent's warehouse. [Tr. 64, 366, 369, 389-394; R. Exh. 4.] Respondent admitted that *any construction work it performs is only a small part of all the services it provides to the trade show and convention industry*. [Tr. 308.] Respondent also admitted it was not a member of any building and construction industry general contractors association and did not have to acquire construction permits to perform any of its work. [Tr. 377.]

(R. Br. at 9, emphasis added.)

It is certainly true that a general contractor in the construction industry does far more than erect buildings. Merely satisfying the recordkeeping requirements of various levels of Government consumes an appreciable portion of the general contractor's efforts, but the same can be said of most large enter-

prises today, regardless of whether they are engaged in the construction industry.

Such support functions, as well as essential sales and staff functions, require a considerable proportion of most employers' efforts, but these functions do not seem to define the essential character of the enterprise. When considering the percentage of resources devoted to support staff, the basic question remains, what mission does this staff support?

Is the mission to construct office buildings and homes? To produce motion pictures? To stage large scale events such as presidential inaugurations or Olympic ceremonies? To produce expositions or trade shows?

All of these examples concern endeavors of relatively brief duration, which require substantial numbers of employees for short periods of time. Thus, they all present somewhat similar problems of finding and hiring skilled or experienced employees for work of short duration. From a labor relations perspective, the challenges faced by these various enterprises appear rather similar.

However, the analogous employment problems faced by the construction industry and the motion picture industry, for example, do not make a movie producer a construction industry contractor entitled to the 8(f) exemption. For purposes of Section 8(f), the movie producer remains a movie producer, and not a building contractor, even though the producer employs many skilled craftsmen to design, construct, and wire highly sophisticated structures and sets.

In *Frick Co.*, 141 NLRB 1204 (1963), the Board adopted the trial examiner's findings and conclusions that the respondent in that case was not primarily engaged in the building and construction industry as that term is used in Section 8(f). The General Counsel had argued that the Board should not look at the respondent's operations as a whole, but only that portion involving the particular collective-bargaining agreement in issue, which was exclusively related to construction work.

The trial examiner rejected the General Counsel's position as being inconsistent with the intent of Congress when it enacted the 8(f) exception:

[A]doption of the General Counsel's view would render valid under Section 8(f) any contract with a building trades union for work to be done on a construction job regardless of the nature of the employer's business. It is a well settled rule of statutory construction that Congress will not be presumed to have intended a vain action. It is also a familiar canon that a statutory provision, which, like Section 8(f) creates an exception to the general scheme of a statute, will be strictly construed. Both these rules militate against acceptance of the General Counsel's construction, and I reject it.

(141 NLRB at 1208 (footnote omitted).)

In light of this reasoning, I find that the Respondent is not engaged *primarily* in the building and construction industry. Certainly, its employees perform considerable construction, but this work is incidental to its mission of producing trade shows, in the same sense that constructing sets or even complete buildings for use in a motion picture would be incidental to the basic mission of producing the film.

If a trade show or movie producer hired a construction contractor to erect a structure, this building activity might well be primary to the mission of the contractor, but it would remain secondary to the mission of the producer. Even assuming for the sake of analysis that the work of assembling displays and

³⁵C.P. Br. at 18. In the portion of the brief quoted above, the Charging Party argued that the term "building and construction industry" as used in Sec. 8(f), should be limited to employers performing work involving structures which are "built into or affixed to the land."

exhibits constitutes activity in the construction industry,³⁶ I find that the Respondent is only *secondarily*, and not primarily, engaged in that industry.

Because the evidence must establish all three requirements listed above, my finding that the Respondent is not primarily engaged in the building and construction industry means that it is not eligible for the 8(f) exemption, and examination of the other two factors is not necessary. However, because the Board might disagree with my finding, I will make findings regarding the other two requirements.

B. Were the Employees Covered by the Agreement Engaged in the Building and Construction Industry?

The evidence does not establish that the employees referred by the Charging Party performed any construction work. They did not build the exhibits and displays. They did not take them apart for shipment, or put them together at the convention site. The work of these employees involved moving the materials from place to place. Therefore, I cannot find that the employees in question did any construction work.

C. Is the Charging Party a Labor Organization of Which Building and Construction Employees are Members?

The evidence does not establish that the Charging Party is a labor organization of which building and construction employees are members. Therefore, the Respondent has not met the third requirement needed to establish its eligibility for the 8(f) exemption.

In making this finding, I have drawn guidance from the legislative history of Section 8(f). When Congress was considering the Landrum-Griffin bill, the McClellan Committee had recently completed hearings on racketeering by officials in certain unions. Congressman Griffin assured his colleagues that making prehire agreements lawful in the construction industry would not encourage sham arrangements with dummy or “sweetheart” unions:

Section 702 of the Committee bill does not open the door to sweetheart contracts or dealings with paper locals dominated by racketeers. Prehire contracts are *negotiated only with unions which can supply the skilled mechanics and laborers required for construction work*. The disclosures before the McClellan Committee related to employees already on the payroll who were forced into racketeering unions not of their own choosing.

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, page 1578, quoting Congressional Record of August 11, 1959 (emphasis added).

The record here does not establish that the Charging Party provided the Respondent any employees skilled in construction work. At most, the evidence suggests that the Union referred employees with experience in transportation work, such as driving a truck or forklift or keeping records of shipments. Since the employees referred by the Union did not perform any construction work for the Respondent, it is not surprising that they would lack such qualifications.

In sum, I find that the record does not establish any one of the three requirements, all of which are necessary to qualify the

Respondent for the 8(f) exemption. Therefore, I find that the Respondent’s collective-bargaining agreements with the Charging Party did not arise under Section 8(f) of the Act.

4. The Respondent’s other defenses

The next defense raised in the Respondent’s answer depends on whether the Union enjoyed majority status at the time the Respondent recognized it. Discussing this defense may entail a repetition of the principles already addressed above under the heading “Representation Under Section 9 of the Act.” However, to the extent that this defense attempts a way around the presumptions on which the General Counsel relies, it appears important to consider it separately. I conclude that no detour around these presumptions exists.

The point of this argument, I believe is that at a general contractor does far more than actually put up buildings, so its nature should not be judged based on what percentage of its revenues paid workers to saw, hammer, weld, or rivet. The Respondent must make this argument, that work in the building and construction industry includes a general contractor’s administrative functions, because building displays and exhibits constitutes only a small part of the Expo Group’s work. The Respondent concedes as much in its brief:

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Such support functions, as well as essential sales and staff functions, require considerable proportion of most employers’ efforts but these functions do not seem to define the essential character of the enterprise. When considering the percentage of resources devoted to support staff, the basic question remains, what mission does this staff support?

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All of these examples concern endeavors of relatively brief duration, which require substantial numbers of employees for short periods of time. Thus, they all present somewhat similar problems of finding and hiring skilled or experienced employees for work of short duration. From a labor relations perspective,

³⁶The structures involved can be more elaborate than suggested by the terms “display” and “exhibit.” Thus, the Respondent introduced evidence about the construction of a complete ACE Hardware store at one location.

tive, the challenges faced by these various enterprises appear rather similar.

However, the analogous employment problems faced by the construction industry and the motion picture industry, for example, do not make a movie producer a construction industry contractor entitled to the 8(f) exemption. For purposes of Section 8(f), the movie producer remains a movie producer, and not a building contractor, even though the producer employs many skilled craftsmen to design, construct, and wire highly sophisticated structures and sets.

The Respondent contends that even if it isn't in the construction industry, its 1993–1996 agreement with the Union was still a prehire agreement, and did not signify that the Union enjoyed majority status at the time the Respondent signed it. The Respondent's brief states, in part:

Even if Respondent is not included in the definition of building and construction industry, it nonetheless has no obligation to bargain with the Union. The voluntary essence of a pre-hire agreement, as articulated in *Deklewa*, supra, does not stem from the "construction industry" nature of an employer's business nor does it stem from Section 8(f). Rather, a pre-hire agreement is voluntary because it is entered into despite the absence of any obligation to do so. An employer signatory to a pre-hire agreement, as with Expo, has no employees from which to determine majority support. In many cases, as here, an employer signs the pre-hire agreement in order to obtain employees. Upon expiration of the agreement, parties enjoy the same non-majority, non-obligatory relationship they enjoyed prior to its execution.

(R. Br. at 24–25.)

It appears that the Respondent is urging me to look at the circumstances surrounding its signing of the agreement. For the reasons discussed above, I cannot do so. The Supreme Court's decision in *Bryan Mfg. Co.*, supra, and the Board's decisions in cases such as *Jim Kelley's Tahoe Nugget*, supra, make that point clear.

The agreements which the Respondent signed with the Union do more than cast the Union in the role of an employment agency sending job applicants when the Respondent needed workers. Rather, these agreements specifically recognize the Union as the employees' collective-bargaining representative. I must presume, conclusively, that the Respondent would not have granted such recognition if the Union had not enjoyed majority status at that time.

However, the Respondent disputes that the case law requires such a presumption. In its brief, the Respondent states:

While Section 10(b) would bar a finding of unfair labor practice in the inception of these contracts, assuming the absence of qualification under Section 8(f), the Board has not permitted Section 10(b) to bar evidence which sheds light upon the beginning nature of a relationship. *Theatrical & Stage Employees*, 266 NLRB 703 (1983); *CIM Mechanical Co.*, 275 NLRB 685 (1985) (October 8, 1980 Agreement, and charge filed August 20, 1982). When one applies this principle to the present case, there is no basis for any presumption of majority status.

(R. Br. at 25.)

The first of the cited cases, *Theatrical & Stage Employees Local 592 (Saratoga Performing Arts Center)*, 266 NLRB 703

(1983), involved whether a union not primarily engaged in the building and construction industry had violated Section 8(b)(1)(A) and (2) of the Act. A subsidiary issue involved whether the union and employer had entered into an arrangement creating an exclusive hiring hall.

The collective-bargaining agreement itself was ambiguous, and thus, the administrative law judge had to look at the practice of the company and union to determine whether, in fact, the only way a person could become employed at the company was to go through the union. The judge decided that he could not consider evidence of events occurring more than 6 months before the filing of the charge. The Board disagreed, citing the Supreme Court's decision in *Bryan Mfg. Co.* for the principle that evidence of such events could be used to "shed light on the true character of matters occurring within the limitations period."

However, this case did not involve a situation in which the lawfulness of the union's action necessarily depended on the lawfulness of an act occurring earlier than the cutoff date imposed by the statute of limitations. Whether or not the union and employer had an exclusive hiring hall arrangement before that cutoff date would be useful to know in determining whether they had such an arrangement during the time period covered by the complaint, but this information was not essential to finding a violation. After all, the union and employer could have changed their arrangement at any time.

Moreover, as the Board noted, in proving a violation of the statutory provisions involved, it was not essential that the union have an exclusive hiring hall arrangement with the company. The Board specifically repudiated the judge's holding that establishing an exclusive hiring hall arrangement was an "essential element of a violation." 266 NLRB at 703 fn. 2.

Therefore, the *Theatrical & Stage Employees Local 592* case illustrates the first situation the Supreme Court described in *Bryan Mfg. Co.* where events which took place before the statute of limitations cutoff date remain "within view" to shed light on more recent events. The Board may look at those events because deciding whether the respondent committed the unfair labor practices alleged in the complaint does not depend on finding that an unfair labor practice occurred before the statute of limitations cutoff date.

The second situation described in *Bryan Mfg. Co.* arises when a particular theory of the case, either the prosecution's theory of violation or the respondent's theory of defense, depends on proving that a violation took place before the statute of limitations cutoff date. That is the situation in this case, where an essential element of the Respondent's defense is proving that it recognized the Union unlawfully before the statute of limitations cutoff date. Therefore, *Theatrical & Stage Employees Local 592*, involving the other type of situation, is not apposite.

The other case cited by the Respondent, *CIM Mechanical Co.*, 275 NLRB 685 (1985), involved an employer indisputably in the construction industry and eligible for the 8(f) exception. Since such an employer does not violate the Act by recognizing a construction industry union pursuant to Section 8(f), looking back to determine what form of recognition the Respondent granted does not involve the Board in determining whether an unfair labor practice occurred before the statute of limitations cutoff date. In *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988), the Board stated:

Nothing in *Bryan* precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period. Going back to the beginning of the parties' relationship here simply seeks to determine the majority or nonmajority based nature of the current relationship and does not involve a determination that any conduct was unlawful either within or outside of the 10(b) period.

(289 NLRB at 982.)

The Respondent's brief also cites language in *Buckley Broadcasting Corp.*, 284 NLRB 1339, 1344 (1987), that "As an evidentiary matter, presumptions should arise when it is believed that proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved." (Footnote omitted.) However, certain presumptions serve purposes which are not wholly evidentiary. For example, the presumptions in *Bryan Mfg. Co.*, discussed above, give effect to the statute of limitations, and the policies embodied in such presumptions govern the trier of fact. Therefore, I conclude that *Buckley Broadcasting Corp.* is inapposite.

In sum, I must reject the Respondent's argument that I may, and should, examine whether the Union enjoyed majority status when the Respondent recognized it. Since the Respondent is not an employer primarily engaged in the building and construction industry, and because the Respondent recognized the Union more than 6 months before the filing of the unfair labor practice charge, I must presume that the Respondent's recognition was lawful, and that the Union then had the support of a majority of unit employees.

The Respondent's next defense states that the "Union, by its actions, has failed and refused to bargain collectively with Respondent." The evidence establishes exactly the opposite. The Union did not engage in "take it or leave it" bargaining, but expressed willingness to negotiate to address the particular needs of the Respondent. Therefore, I must reject this defense.

The Respondent's next defense contends that the Union "has never alleged or established its majority status in regard to the unit named in the Complaint." My findings that the amended complaint describes the unit actually in existence at the time the Respondent withdrew recognition, and that the Union was the majority representative of the Respondent's employees in this unit, cause me to reject this defense.

The next defense raised by the Respondent's answer alleges that it "has a reasonable basis for believing that the Union does not have a majority status" in any unit of the Company's employees. The Respondent did not present any evidence to show that it relied on objective considerations that the employees no longer supported the Union. Therefore, I must reject this defense.

Finally, the Respondent's answer alleges that at all relevant times, another labor organization has been the exclusive bargaining representative of "certain of the positions named in the unit" described in the complaint. Again, the Respondent did not present evidence to support this defense.

The record suggests another labor organization represents the employees classified as decorators, and that this labor organization sometimes has disputed the assignment of truck driving work. However, there is no evidence that any other union represents, or has represented, the employees in the unit de-

scribed in paragraph 7 of the complaint, as amended. Therefore, I must reject this defense.

In sum, I do not find merit in any of the Respondent's defenses. Instead, I find that the General Counsel has established that the Respondent committed the unfair labor practices alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Pekowski Enterprises, Inc. d/b/a the Expo Group, is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Teamsters, Local Union 745, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: drivers, checkers, helpers, warehousemen, dockmen, forklift operators, mechanic Class A, mechanic Class B, servicemen, partsmen, tiremen, within the jurisdiction of Teamsters Local 745.

Excluded: all other employees, including forklift operators working on premises for which a building permit has been issued, guards and supervisors, as defined in the Act.

4. Since on or about May 1992, and at all times thereafter, the Charging Party has been the exclusive collective-bargaining representative of the unit described in paragraph 3, above, based on Section 9(a) of the Act.

5. Some time in May 1992, the exact date not known, the Respondent recognized the Charging Party as the exclusive bargaining representative of the employees described in paragraph 3, above. The Respondent executed two collective-bargaining agreements, embodying this recognition, the latter of which was effective by its terms from August 1, 1993, through July 31, 1996.

6. On August 1, 1996, without affording the Charging Party prior notice or an opportunity to negotiate regarding the changes and their effects, the Respondent ceased applying the terms of the 1993-1996 collective-bargaining agreement described in paragraph 5, above. These terms concerned mandatory subjects of bargaining, and included a requirement that the Respondent use the Charging Party's referral services when seeking applicants for employment.

7. By letter dated September 26, 1996, the Respondent withdrew recognition from the Charging Party and, at all times thereafter, has refused to recognize and bargain with the Charging Party as the exclusive representative of the employees in the unit described in paragraph 3, above.

8. By the actions described in paragraphs 6 and 7, above, the Respondent failed and refused to bargain collectively and in good faith with the Charging Party, and thereby violated Section 8(a)(5) and (1) of the Act.

9. The unfair labor practices described above affected commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom, and take certain affirmative action necessary to effectuate the policies of the Act.

Specifically, on these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended³⁷

ORDER

The Respondent, Pekowski Enterprises, Inc. d/b/a the Expo Group, Irving Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Charging Party as the exclusive representative of its employees in the unit found appropriate here.

(b) Making changes in the terms and conditions of employment of the employees in the unit found appropriate here, without first notifying the Charging Party of its intention to make such changes, and affording the Charging Party the opportunity to engage in negotiations regarding such proposed changes and their effects, in accordance with the Respondent's duty under Section 8(d) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the terms and conditions of employment which were in effect, and applicable to employees in the bargaining unit, including use of the Charging Party's employment referral service in the manner agreed on in the parties' 1993–1996 collective-bargaining agreement, before the Respondent unilaterally changed those terms and conditions of employment on August 1, 1996.

(b) Make whole, with interest, those employees who would have been referred for employment through the Charging

Party's referral system and employed by the Respondent but for the unlawful unilateral changes in terms and conditions of employment which it made on August 1, 1996.

(c) Recognize and bargain with the Charging Party as the exclusive collective-bargaining representative, pursuant to Section 9 of the Act. of the employees in the unit found appropriate here.

(d) Within 14 days after service by the Region, post at its Irving, Texas facility copies of the attached notice marked as "Appendix B."³⁸ Copies of the notice on forms provided by the Regional Director, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since September 26, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

³⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

³⁸If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."